IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDCITION
WRIT PETITION NO. 2354 OF 2005

Vidya V. Kulkarni)
a citizen of India, residing at)
F-67, 2nd floor, Gandhiraj)
Society,Mithanagar,)
Mithanagar Road,)
Mulund (East),)
Mumbai - 400 081) ....Petitioner.

V/s

Bombay Khadi & Village)
Industries Association,)
286, D.N. Road, Fort,)
Mumbai- 400 001) ....Respondent.

Mr. Mahesh Londhe i/b M/s. Sanjay Udeshi & Co. for the Petitioner.

Ms. Dhanashree Shende i/b Mr. N.V. Gangal for Respondent No.1.

ALONGWITH
WRIT PETITION NO. 1996 OF 2005

Parshuram Krishna Matkar)
a citizen of India, residing at)
5-C Gurukripa, Chawl No.2,)
Anand Nagar,Appa Pada,)
Malad, Mumbai- 400 097.) ....Petitioner.

V/s

Bombay Khadi & Village)
Industries Association,)
286, D.N. Road, Fort,)
Mumbai - 400 001) .....Respondent.

Mr. Mahesh Londhe i/b M/s. Sanjay Udeshi & Co. for the Petitioner.

Ms. Dhanashree Shende i/b Mr. N.V. Gangal for Respondent No.1.

CORAM: V.M. KANADE, J.
DATE : 21st April, 2007

ORAL JUDGMENT:

1. Both these Writ Petitions can be disposed of by a common judgment.

FACTS:

2. The Petitioner in Writ Petition No. 2354 of 2005 joined services of the Respondent as a clerk-cum-Salesgirl in the Furniture Department on 29/09/1981. She was a member of the Mumbai Mazdoor Sabha which is a recognized Union, functioning for the Respondent's Establishment. The Petitioner in Writ Petition No. 1996 of 2005 joined the services of the Respondent as a peon in the Silk Centre of the Khadi Bhavan on 15/04/1982 and he was also an active

member of the Mumbai Mazdoor Sabha. The Respondent is an institution registered under the Societies Registration Act, 1960 and under the Bombay Public Trust Act, 1950 and has employed about 400 workmen in its various establishments in Mumbai.

3. Both these Petitioners were issued memo in May 1989 in which certain allegations of misconduct were made. Both of them gave reply to the said show cause memo, denying and disputing the allegations which were made in the said memo. Both the Petitioners and 13 others were issued charge-sheet for the same or similar misconduct which was allegedly committed by them in respect of the incident which had taken place on 15/04/1989.

4. A joint inquiry of the Petitioners and two others commenced on 12/06/1989 and this inquiry was concluded on 13/06/1992. The Inquiry Officer submitted his report alongwith his findings and on the basis of the inquiry report, services of the Petitioner Parshuram Matkar were terminated on 07/08/1993 and that of Ms. Vidya Kulkarni were

terminated on 10/08/1993.

5. It is the case of the Petitioners that the Respondent did not file any application for approval under section 33(2)(b) of the Industrial Disputes Act. Both the Petitioners, therefore, filed a complaint in pending Reference (IT) No. 124 of 19988 being complaint (IT) No. 6 of 1993 and Complaint (IT) No. 5 of 1993 under section 33A of the Industrial Disputes Act. In both these complaints, written statement was filed by the Respondent. The Industrial Court by its judgment and order dated 23/04/2003 decided both the complaints holding that the termination of services of the Petitioners was in contravention of section 33(2)(b) of the Industrial Disputes Act and further held that the said action on the part of the Respondent was not justified and amounted to unfair labour practice. The Tribunal, however, instead of granting reinstatement, directed the Respondent to pay compensation of Rs 2,20,000/- in the case of Parshuram Matkar and Rs. 2,16,800/- in the case of Vidya Kulkarni towards damages for the unjustified termination of the Petitioners' services. The Respondent challenged the orders

passed in the aforesaid complaints by filing Writ Petition Nos. 86 and 87 of 2004 in this Court. Both these Writ Petitions were rejected by order dated 17/02/2004 and liberty was granted to the Petitioners to pursue the remedy for enhancement of compensation. SLP filed by the Respondent in the Supreme Court was rejected by order dated 11/11/2005.

6. Both the Petitioners filed the aforesaid Petitions challenging the order passed by the Industrial Tribunal dated 23/04/2003. In both these Petitions, Petitioners have prayed that this Court may issue appropriate writ, order or direction directing the Respondent to reinstate the Petitioner in service with full back wages and continuity of service alongwith all consequential benefits.

SUBMISSIONS:

7. The learned Counsel appearing on behalf of the Petitioners submitted that the Tribunal had erred in awarding compensation to the petitioners instead of passing an order

of reinstatement with full back wages. He submitted that having held that mandatory provisions of section 33(2)(b) had not been complied with, the Tribunal erred in thereafter only granting compensation to the Petitioners. He submitted that the case of the Petitioners was squarely covered by the Judgment of the Supreme Court in the case of Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd. Vs. Ram Gopal Sharma and Others, reported in **(2002) 2 SCC 244.** It is submitted that the Tribunal erred in granting compensation and not reinstatement since the other two employees against whom charge-sheets were issued viz. Prakash Bhogle and Chandrakant Malpute were taken in service by the Respondent. It is submitted that by not reinstating the Petitioners in service, the Respondent had discriminated between the said reinstated employees and the Petitioners herein. The learned Counsel submitted that the Apex Court in the case of Workmen of Bharat Fritz Werner Private Limited Vs. Bharat Fritz Werner Private Limited, reported in **1990 Lab I.C. 844** has held that only in exceptional circumstances compensation should be granted in lieu of reinstatement. He submitted that such circumstances did

not exist in the case of the Petitioners herein. He submitted that the Industrial Court had failed to appreciate that the benefit under section 33A was available to an employee who was aggrieved by the order granting approval under section 33(2)(b) and, as such, the employer whose application is rejected under the said provisions is not entitled to get any relief in an application filed by the employee under section 33A.

8. The learned Counsel appearing on behalf of the Respondent, on the other hand, submitted that the order of termination was dated 07/08/1993 & 10/08/1993 respectively and that the approval under section 33(2)(b) of the Act was not mandatory in nature and, at the relevant time, the judgment in the case of Punjab Beverages Pvt. Ltd. Vs. Suresh Chand and another, etc. reported in **AIR 1978 SC 995** was in vogue wherein it was held that the provisions of section 33(2)(b) were directory in nature and it was only in 2002 in the case of Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd (supra) a judgment was pronounced by the Constitution Bench overruling its earlier judgment in the case of Punjab

Beverages Pvt. Ltd (supra). It is submitted that, therefore, the ratio of the earlier judgment in the case of Punjab Beverages Pvt. Ltd (supra) was applicable to the facts of the present case. He also relied on the judgment of Workmen of Bharat Fritz Werner Private Limited (supra). He submitted that the Tribunal has observed that the departmental inquiry was not only held to be fair and proper but the Tribunal had assembled on 66 days for the purpose of hearing the parties. He further submitted that the activity of the Respondent was essentially on no profit no loss basis and the object of the institute was to encourage Swadeshi and provide work to the artisans from the rural areas and that there was no vacancy to reinstate the Petitioners and, therefore, the Tribunal had rightly granted compensation instead of reinstatement. It is submitted that the services of the Petitioners were terminated after holding a full-fledged inquiry and the reference which was pending was for the general demands of certain employees employed by the Respondent.

FINDINGS AND CONCLUSION:

9. I have given my anxious consideration to the submissions made by the learned Counsel appearing on behalf of the Petitioners and the Respondent. The Tribunal has recorded a finding that the services of the Petitioners were terminated without obtaining approval under section 33 (2)(b) of the Industrial Disputes Act. The Respondent had challenged the order passed by the Tribunal. However, the order was confirmed by this Court in Writ Petition Nos. 86 and 87 of 2004. Even the SLP which was filed by the Respondent was rejected by the Apex Court. The finding of the learned Industrial Court is that the termination of services of the Petitioners was in contravention of section 33 (2)(b) of the Industrial Disputes Act and it was unjustified. The perusal of the order passed by the Apex Court in the SLP filed by the Respondent reveals that the Apex Court has recorded that the Counsel appearing on behalf of the Respondent had made a statement that the issue had been concluded against the Respondent herein in the decision of the Supreme Court in Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd. (supra). The Respondent, therefore, had admitted in the

Supreme Court that the ratio laid down in the case of n Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd. (supra) was applicable to the facts of the present case.

10. It would be relevant to consider the judgment of the Supreme Court in Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd. (supra). The Apex Court in the said case held that if there was a failure on the part of the employer to make an application under section 33(2)(b) seeking approval to the order of termination then, in that case, the dismissal was ineffective from the date it was passed and that the employee was entitled to wages from the date of dismissal. By the said judgment, the judgment of the Supreme Court in the case of Punjab Beverages Pvt. Ltd (supra) was overruled. The said judgment was delivered by the Constitution Bench of the Supreme Court after the matter was referred to the Constitution Bench. In this Context, the observations of the Supreme Court in para 14 and 15 of its judgment in the case of Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd. (supra) are relevant and it will be profitable to reproduce these observations. The said paras 14 and 16 read as under:-

"14. Where an application is made under Section 33(2)(b) proviso, the authority before which the proceeding is pending for approval of the action taken by the employer has to examine whether the order of dismissal or discharge is bona fide; whether it was by way of victimization or unfair labour practice; whether the conditions contained in the proviso were complied with or not etc. If the authority refuses to grant approval obviously it follows that the employee continues to be in service as if the order of discharge or dismissal never had been passed. The order of dismissal or discharge passed invoking Section 33(2)(b) dismissing or discharging an employee brings an end of relationship of the employer and employee from the date of his dismissal or discharge but that order remains incomplete and remains inchoate as it is subject to approval of the authority under the said provision. In other words, this relationship comes to an end de jure only when the authority grants approval. If approval is not given, nothing more is

required to be done by the employee, as it will have to be deemed that the order of discharge or dismissal had never been passed. Consequence of it is that the employee is deemed to have continued in service entitling him to all the benefits available. This being the position there is no need of a separate or specific order for his reinstatement. But on the other hand, if approval is given by the authority and if the employee is aggrieved by such an approval, he is entitled to make a complaint under Section 33-A challenging the order granting approval on any of the grounds available to him. Section 33-A is available only to an employee and is intended to save his time and trouble inasmuch as he can straightaway make a complaint before the very authority where the industrial dispute is already pending between the parties challenging the order of approval instead of making efforts to raise an industrial dispute, get a reference and thereafter adjudication. In this view, it is not correct to say that even though where the order of discharge or dismissal is inoperative for contravention of the mandatory conditions contained in the

proviso or where the approval is refused, a workman should still make a complaint under Section 33-A and that the order of dismissal or discharge becomes invalid or void only when it is set aside under Section 33-A and that till such time he should suffer misery of unemployment in spite of the statutory protection given to him by the proviso to Section 33(2)(b). It is not correct to say that where the order of discharge or dismissal becomes inoperative because of contravention of proviso to Section 33(2)(b), Section 33-A would be meaningless and futile. The said section has a definite purpose to serve, as already stated above, enabling an employee to make a complaint, if aggrieved by the order of the approval granted."

"15. The view that when no application is made or the one made is withdrawn, there is no order of refusal of such application on merit and as such the order of dismissal or discharge does not become void or inoperative unless such an order is set aside under Section 33-A, cannot be accepted. In our view, not making an

application under Section 33(2)(b) seeking approval or withdrawing an application once made before any order is made thereon, is a clear case of contravention of the proviso to Section 33(2)(b). An employer who does not make an application under Section 33(2)(b) or withdraws the one made, cannot be rewarded by relieving him of the statutory obligation created on him to make such an application. If it is so done, he will be happier or more comfortable than an employer who obeys the command of law and makes an application inviting scrutiny of the authority in the matter of granting approval of the action taken by him. Adherence to and obedience of law should be obvious and necessary in a system governed by rule of law. An employer by design can avoid to make an application after dismissing or discharging an employee or file it and withdraw before any order is passed on it, on its merits, to take a position that such order is not inoperative or void till it is set aside under Section 33-A notwithstanding the contravention of Section 33(2)(b) proviso, driving the employee to have recourse to

> one or more proceedings by making a complaint under Section 33-A or to raise another industrial dispute or to make a complaint under Section 31(1). Such an approach destroys the protection specifically and expressly given to an employee under the said proviso as against possible victimization, unfair labour practice or harassment because of pendency of industrial dispute so that an employee can be saved from hardship of unemployment."

From the observations made in the said paras, it is clear that if the authority refuses to grant approval then, in that case, a natural consequence which would emerge as a result of that would be that the employee continues to be in service as if the order of discharge or termination has never existed. The order of termination, therefore, would become complete only after the approval is granted by the authority under section 33(2)(b). Once, therefore, the approval is not granted or is not sought in the first place would render the order of termination or discharge ineffective and will be treated as if it had never come into existence. As a natural corollary to

that, it will have to be treated as if the employee is still in service and is entitled to all the benefits. The submission of the learned Counsel appearing on behalf of the Respondent that since the order of termination was passed in 1993 and, therefore, the ratio of the judgment of the Supreme Court in the case of Punjab Beverages Pvt. Ltd (supra) would be applicable to the facts of the present case cannot be accepted. The Apex Court, however, has overruled the said judgment. The natural consequence is that the law laid down by the Supreme Court would, therefore, be applicable to the case of the Petitioners and the Respondent, now, cannot take recourse to the judgment which is overruled by the Constitution Bench of the Supreme Court.

11. The only question which now requires to be considered is whether the Tribunal was right in directing compensation to be awarded to the Petitioners instead of granting relief of reinstatement. In my view, the Tribunal clearly erred in granting compensation to the Petitioners to the tune of Rs 2,20,000/- and Rs. 2,16,800/- respectively. A perusal of the order discloses that no reasons have been given by the

Tribunal for granting compensation to the tune of Rs 2,20,000/- and Rs. 2,16,800/- respectively. The order passed by the Tribunal, to that extent, will have to be set aside. The ratio of the judgment in the case of Punjab Beverages Pvt. Ltd. (supra) on which the reliance is placed by the learned Counsel for the Respondent is not applicable to the facts of the present case. In the present case, the mandatory provisions of section 33(2)(b) have not been complied with and, as a result, the order of termination has not come into existence since the approval was not obtained or sought by the Respondent. A natural corollary, therefore, would be that, in such a case, the worker is deemed to be in service during this period of alleged termination. The ratio of the judgment of the Supreme Court in the case of Workmen of Bharat Fritz Werner Private Limited (supra) is also not applicable to the facts of the present case.

12. In the result, both the Writ Petitions are allowed. The impugned order of the Tribunal is set aside to the extent it awards compensation to the Petitioners in lieu of reinstatement. Petitioners, therefore, are directed to be

reinstated from the date of their alleged termination with continuity of service and consequential benefits.

13. The only question which now remains to be decided is regarding back wages which should be awarded to the Petitioners herein. It is no doubt true that the order of termination has obviously not come into existence for want of proper approval under section 33(2)(b) but, taking into consideration the recent judgments of the Apex Court, it could not be said that, ipso facto, the Respondent would be entitled to get full back wages with the order of reinstatement. In the present case, considering the peculiar facts and circumstances and also particularly the fact that the Respondent is an organization which has been established to preserve ideals of Swadeshi Movement which was started by Mahatma Gandhi, if an order of reinstatement with full back wages is granted it is possible that the Respondent would not be in a position to pay the said amount of full back wages. Therefore, in my view, ends of justice would be met if reinstatement is granted to the Petitioners with back wages @ 50%. Accordingly

Respondent is directed to reinstate the Petitioners with back wages @ 50%. With these directions, Rule is made absolute.

14. Writ Petition is accordingly disposed of.

(V.M. KANADE, J.)